

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOWARD UNIVERSITY HOSPITAL

and

Case 5-CA-35584

JOAN STEVENSON, an Individual

Daniel Heltzer and Brendan Keough, Esqs.,
for the Acting General Counsel.
Leroy Jenkins, Jr. and Candace Dabney Smith, Esqs.,
of Washington, D.C., for the Respondent.

DECISION

Statement of the Case

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Washington, D.C., from September 13–15, 2010. The charge was filed on February 16, 2010, and the complaint was issued on May 28, 2010. The complaint alleges that Howard University Hospital (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by unlawfully discriminating against and/or coercing employee Ms. Joan Stevenson (Stevenson)¹ by: discouraging her from speaking at an October 30, 2009 staff meeting about terms and conditions of employment in the hospital ultrasound department; admonishing Stevenson at a November 4, 2009 meeting with her supervisor about her tone in the October 30 meeting; issuing a disciplinary memorandum to Stevenson on December 18, 2009, for having her daughter present in the patient care area, and delaying meeting with her supervisor about that issue; and terminating her on or about January 9, 2010, for engaging in protected concerted activities and/or union activities.² The Respondent filed a timely answer denying the alleged violations in the complaint.

¹ Unless otherwise noted, all references to Stevenson refer to Joan Stevenson.

² During trial, I granted the General Counsel's request to amend the complaint to: (a) add Joseph Martinez and Howard Hill as additional supervisors in par. 4 of the complaint; (b) amend par. 10(c) of the complaint to allege that Stevenson was terminated on or about January 9, 2010 (instead of on or about January 5, 2010, as originally alleged); and (c) add par. 9(c), to allege: On or about November 4, 2009, in his office, the Respondent's District of Columbia facility, (Mr. Vonzell Barker) threatened employees by telling them he hoped they would not again raise concerns as they did in the meeting described above in par. 8. The Respondent did not object to the requests to amend the complaint, but did deny the factual allegations outlined in items (b) and (c) noted above. Transcript (Tr.) 12-15, 170–171.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

5 Findings of Fact

I. Jurisdiction

10 The Respondent, a corporation, operates a hospital that provides inpatient and outpatient medical care in Washington, D.C., where it annually derives gross revenue in excess of \$250,000 and purchases and receives goods valued in excess of \$5000 directly from points located outside of the District of Columbia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the National Union of Hospital and Health Care Employees, Local 2094, American
15 Federation of State, County and Municipal Employees (AFSCME or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

20 A. Background Facts

In 2007, the Union and the Respondent entered into a collective-bargaining agreement that addresses (among other things) terms and conditions of employment, overtime, and discipline and discharge, and also outlined grievance procedures (including arbitration) for all
25 regular, probationary staff, temporary and part time hospital employees, including employees in the hospital radiology department. GC Ex. 2 at 2. The agreement recognized the Union as the exclusive bargaining agent for the employees covered by the agreement.⁴ Id.

30 The Respondent's radiology department is separated into three primary areas: main radiology (including plain film, nuclear medicine, special procedures, CT and ultrasound); outpatient (including MRI, CT); and women's imaging (including mammograms, DEXA procedures and outpatient ultrasound). In 2009, the radiology department performed over 91,000 procedures. Tr. 394-395.

35 During the relevant time period, the radiology department generally employed five ultrasound technologists (also known as sonographers),⁵ with three ultrasound technologists assigned to the day shift, one assigned to the evening shift, and one assigned to the night shift. Tr. 38-39. To meet its staffing requirements, the Respondent hired full-time ultrasound technologists (staff technologists), but also supplemented its staff with contract agency
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45 ³ The trial transcript is generally accurate, but I make the following corrections to clarify the record: (a) at Tr. 174, line 23, the word "her" should be "your"; (b) references to January 24, 2010 at Tr. 204-206 are incorrect, and the correct date is at some point on or before January 5, 2010; and c) at Tr. 270, line 11, the word "irrelevance" should be "relevance," and the speaker at line 12 should be Mr. Heltzer.

⁴ The agreement excluded the following employees: all employees covered by other contracts, personnel employees, trainees, requisition and student employees, supervisory, confidential office employees, administrative and managerial employees, [and] physical and occupational therapists. GC Exh. 2 at 2.

50 ⁵ Ultrasound technologists perform (or assist doctors with) ultrasound and biopsy procedures. Tr. 138.

technologists (agency technologists) who are employed by an outside agency that provides staff to the Respondent as needed. Tr. 39, 139. Mr. Vonzell Barker supervised the ultrasound department (as well as certain other departments within radiology). Tr. 38, 139-141.

5 Under the collective-bargaining agreement, new employees join the hospital as probationary employees. A probationary employee is one hired to work for a trial period of 6 months with the expectation of continued employment. GC Exh. 2, p. 2. Although probationary employees are members of the bargaining unit, probationary employees are employed at will during the trial period, and thus the Respondent may terminate probationary employees without
10 completing the progressive discipline process set forth in the collective bargaining agreement.⁶ Tr. 203, 219-220.

B. Stevenson Joins The Radiology Department

15 On July 6, 2009, Stevenson joined the radiology department at Howard University Hospital as a probationary registered ultrasound technologist.⁷ Tr. 34; see also GC Exh. 15. From July 2009 to January 2010, Stevenson normally worked the day shift⁸ with Ms. Avril Rutherford (a staff technologist) and Ms. Nina Madden (an agency technologist), while Ms. Sahra Mire (a staff technologist) worked the evening shift. Tr. 138-139, 345-346. The shift
20 hours overlapped slightly, such that the final hour of one shift overlapped with the first hour of the following shift. Tr. 346.

Shortly after Stevenson joined the ultrasound department in July 2009, Dr. Bonnie Davis and other radiologists formed the opinion that some of Stevenson's ultrasound work was
25 deficient because the resulting images or studies were not sufficiently reliable. Tr. 322-324. To address that issue, Stevenson was paired up with another ultrasound technologist (Avril Rutherford) for a period of 2 weeks to improve her skills.⁹ Tr. 325. Stevenson's skills improved to an acceptable level after the 2 week training period with Rutherford.¹⁰ Tr. 325.

30 C. Stevenson Expresses Her Concerns About the Ultrasound Department

In late August 2009, Stevenson asked Barker about the possibility of serving as the lead ultrasound technologist on a temporary basis until Barker selected someone to fill that role on a permanent basis. Tr. 43-44. In the same time period, Stevenson volunteered for a weekend
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⁶ Ms. Regina Bryan, an employee and labor relations specialist for the Respondent, did indicate that although progressive discipline is not required for probationary employees, she does ask supervisors whether they provided a probationary employee selected for termination the opportunity to correct his or her behavior. Tr. 220.

⁷ Stevenson also worked for Howard University Hospital from 1987 to 1991. Tr. 32-33.

⁸ Stevenson generally worked the night shift in July and early August 2009, and then switched to the day shift. Tr. 44.

⁹ On rebuttal, Rutherford testified that she trained six ultrasound technologists (including Stevenson) using the buddy system described herein. Sahra Mire was one of those six
45 individuals, and paired up with Rutherford for a period of 2 months after commencing her employment with the Respondent in 2007. Tr. 345, 416-417.

¹⁰ Dr. Davis testified that although Stevenson's skills improved, where possible she (Dr. Davis) chose to work with other ultrasound technologists because she had established relationships with them and felt more confident about their work. Tr. 326-327. There is no
50 evidence that Dr. Davis communicated any additional concerns about the quality of Stevenson's work to Barker after Stevenson completed her 2 week training period with Rutherford.

overtime shift and, in connection with expressing a general interest in more overtime hours, asked Barker whether the Respondent's policy was to give those hours to agency technologists before staff technologists. Barker responded that he needed to cover his department as he saw fit.¹¹ Tr. 46-47.

In a memo dated August 28, 2009, Barker agreed to have Stevenson "take on a more active participatory role in improving the daily operation of the sono area" for a six to nine month period, and switched Stevenson to the day shift to facilitate her new role. Tr. 43-44; GC Exh. 3. Barker also acknowledged Stevenson's desire to work overtime, and promised to provide her with a monthly schedule showing available overtime slots (starting with the September 2009 schedule, which was attached to the memo), with the caveat that he had to balance her request with the "overall provision of service for the entire operation." Finally, Barker stated that he expected Stevenson to be serious about working any additional shifts she selected, noting that he found it difficult to backfill an overtime shift that Stevenson backed out of "with very little notice."¹² GC Exh. 3.

Stevenson reviewed the September 2009 schedule, and signed up for 9 open overtime slots (out of the 22 that were available), including Labor Day. Upon learning that she was not assigned to the Labor Day shift that she requested, Stevenson expressed her complaint to Rutherford. Both Stevenson and Rutherford then went to the union office, where Stevenson questioned whether it was proper for Barker to assign the Labor Day shift (or any overtime hours) to an agency technologist when a staff technologist wanted to work the same shift.¹³ Tr. 52-53, 158-159. Stevenson again asked Barker for more overtime hours on October 10, 2009, and was told that he (Barker) had to staff the department as he saw fit. Tr. 61-62.

In addition to her concerns about overtime, Stevenson became concerned about Nina Madden's role in the ultrasound department. Specifically, Stevenson believed that Madden was acting like a supervisor in the department by (among other things) ordering furniture and supplies, even though Madden was an agency technologist and other members of the department (such as Rutherford) had more experience. Tr. 58-60. Stevenson and Rutherford discussed these concerns on a regular basis.¹⁴ Tr. 60, 156-158.

¹¹ Barker also testified about this discussion with Stevenson about overtime, but did not mention any discussion of whether staff or agency technologists have priority when selecting overtime shifts. I have credited Stevenson's account of the exchange because it is consistent with the record as a whole (which shows that Stevenson had an ongoing concern about the overtime policy), and because Barker did not deny these aspects of Stevenson's testimony even though he was present in the courtroom (as the Respondent's designated assistant) for Stevenson's testimony.

¹² Stevenson admitted that in late August, she notified Barker that she could not perform a Sunday overtime shift for which she volunteered. Stevenson notified Barker of this issue on the Thursday before the overtime shift. Tr. 48.

¹³ Rutherford accompanied Stevenson to this meeting even though she (Rutherford) did not work overtime shifts. Tr. 160.

¹⁴ Sahra Mire observed Stevenson's developing frustration with Madden's role in the department. On one occasion, Mire observed Stevenson become agitated after Stevenson learned that Madden planned to order supplies. Stevenson began pacing around the room, repeating the word stupid as she did so. Tr. 353-355. On another occasion, Mire heard Stevenson say (in an animated fashion) that Madden was nothing and not important, in contrast to the staff technologists in the ultrasound department. Tr. 355-356. Mire was taken aback by these incidents, but the record does not show that either incident was ever reported to Barker.

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D. The October 30, 2009 Staff Meeting

On October 30, 2009, Stevenson attended the monthly ultrasound team meeting in the mammogram conference room. Barker, Rutherford, and Madden were also present. After Barker covered some opening topics about the volume of patients in the department, the November schedule and the need for written protocols for the department, he asked if any of the employees had any concerns to address. Tr. 62-64, 66, 142-145, 242-244, 291-294. In response, Stevenson said she had some concerns about the leadership and supervision in the ultrasound department. Specifically, Stevenson stated that the department seemed like it did not have direction, and added that although she had volunteered to help with leading the department, Barker had not acknowledged that and instead used Madden as a go-between between himself and staff technologists. Stevenson also expressed concern about how supplies were being ordered for the department, asserting that the technologists did not know who to go to for supplies or supply requests. And, Stevenson raised a concern about overtime, asserting that contrary to Union policy to give staff technologists priority over agency technologists for overtime, the schedule listed agency technologists for overtime slots before the staff technologists had an opportunity to select those slots.¹⁵ Tr. 67-69, 145-146, 148, 244-

Tr. 355-59 (the only incident concerning Mire that was conveyed to Barker was a dispute, discussed infra, between Mire and Stevenson about who should handle certain patients during a shift change).

Similarly, Madden was aware of Stevenson's objections to Madden's role in the department. On October 30, 2009, Madden advised Stevenson that Barker postponed the monthly staff meeting from 8 to 8:30 a.m. and indicated that the meeting would be held in the mammography department. In Madden's presence, Stevenson questioned why Barker notified Madden instead of notifying a staff technologist. Tr. 299-300. In another exchange, Stevenson objected when Madden advised her that Dr. Davis wished to be present during a procedure Stevenson would be performing. In Madden's presence, Stevenson questioned why Dr. Davis conveyed this message through Madden instead of communicating directly to Stevenson. Tr. 300-301. There is no evidence that Madden advised Barker about either of these two incidents. Tr. 302-303.

¹⁵ Barker testified that Stevenson did not raise the issue of overtime at the October 30, 2009 meeting. Tr. 245. After being confronted with his affidavit, Barker maintained that Stevenson raised the issue of overtime on October 30, but did not do so at the staff meeting, but instead at a later point in the day. Tr. 247; *see also* GC Exh. 4 (Barker's minutes of the October 30, 2009 staff meeting). I do not credit Barker's testimony (or his meeting minutes) on this point. First, he was contradicted by both Stevenson and Rutherford. Second, Madden (who was called by the Respondent, and was the only other person who attended the meeting besides Barker) also contradicted Barker. In her testimony on direct, Madden offered a summary of the topics discussed at the meeting that included scheduling and "does anyone want to sign up for . . . any of the available hours." Tr. 292. However, in response to cross-examination, Madden admitted that Stevenson not only asked about overtime hours, but also asserted that agency technologists were getting preference for the hours that she (Stevenson) wanted. Tr. 311. Third, Barker's assertion that Stevenson did not raise the issue of overtime in the staff meeting is implausible, in light of his ongoing discussions with Stevenson about overtime hours and the fact that the November schedule was discussed at the meeting before Stevenson spoke. And fourth, Barker had motive to deny that Stevenson raised the issue of overtime at the meeting (as an issue affecting the entire staff, rather than just herself), because the issue of overtime is addressed in the collective-bargaining agreement and was the subject of a prior dispute between the Respondent and the Union regarding multiple employees. See

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247. Barker asked Stevenson if the conversation she was starting should occur privately instead of in the staff meeting, and indicated that he preferred to discuss the issues with Stevenson one-on-one in his office. Stevenson declined, stating that she preferred to make her concerns known at the meeting since they affected all of the technologists, and because she wanted to avoid a he-said/she-said scenario that could result from a private conversation. Tr. 69, 145–146. Returning to the topic of overtime, Stevenson stated that she had been asking Barker for overtime, but he refused to give it to her. In that connection, she invited Barker to call any of her prior employers to verify that she is a hard worker. Barker invited Stevenson to sign up for any available overtime slot on the schedule, but refused Stevenson's request to sign up for slots already assigned to an agency technologist. Stevenson insisted that she was entitled to the overtime hours, and asserted that she would take the issue to the Union if her request was denied. Barker then told Stevenson that she was full of herself. Tr. 69-70, 146–148. Before the meeting adjourned, Madden advised Barker that she needed some time off for Thanksgiving, and Barker agreed to adjust the schedule once he received the necessary information from Madden. Stevenson then cited that exchange as an example of Barker giving preferential treatment to agency technologists, asserting that he was willing to change the schedule for Madden, but not Stevenson.¹⁶ Tr. 70, 149.

E. November 2009 Conflict Between Stevenson and Mire

In early November 2009, a conflict developed between Stevenson and Mire when their work shifts overlapped (Stevenson was completing the day shift, and Mire was starting the evening shift).¹⁷ At approximately 4 p.m., Stevenson sent for a patient who required a study in the ultrasound department. When the patient arrived, Mire (who had just started her shift) and Stevenson converged on the patient, resulting in a debate about who should perform the study. Mire's view was that she should handle the patient since her shift was beginning, while Stevenson's view was that she routinely stayed until 5 p.m. and should perform the study on the patient that she sent for.¹⁸ Tr. 89, 345–347, 351. Mire relented and allowed Stevenson to handle the patient, but left the dispute (which she described as including a brief tug-of-war on

GC Exh. 16 (May 18, 2009 memo regarding overtime hour settlement, sent to Barker and other supervisors). In short, contrary to Barker's testimony (see Tr. 410–412); I find that Stevenson did raise the issue of overtime at the October 30 ultrasound staff meeting.

¹⁶ Stevenson, Barker, Madden and Rutherford each testified about Stevenson's tone and demeanor during the October 30 meeting. Although Stevenson spoke in an assertive manner and in a somewhat elevated voice (but short of yelling), she did not use profanity or engage in any behavior that attracted the attention of anyone who may have passed by the conference room. Tr. 71–73, 149–150, 295, 314.

¹⁷ Both Stevenson and Mire were somewhat unclear about the date of this incident, but I find that the approximate date is established by subsequent email communication to Barker about the incident. See Respondent (R.) Exh. N (On November 18, 2009, Dr. Davis indicated that the incident occurred over two weeks before her email).

¹⁸ It was not uncommon for ultrasound technologists who were concluding one shift to work simultaneously (for a brief period of time) with ultrasound technologists scheduled to start the next shift. There are no written guidelines concerning which technologist handles which patient during these time periods when shifts overlap. In response to my question about whether any unwritten guidelines addressed this issue, Barker stated that (in his view) an ultrasound technologist who starts a patient before his or her shift ends should finish that patient. However, Barker also stated that the ultrasound technologist starting his or her shift should handle any new patient arriving in the department after their shift began. Tr. 274–275. Stevenson and Mire's dispute arose out of this ambiguity.

the patient's gurney) feeling as if Stevenson blocked her from starting her shift. Mire communicated her concerns to Dr. Davis, who observed that Mire appeared shaken and anxious. Tr. 328. Dr. Davis in turn advised Barker of the incident. Tr. 329-331; *see also* R. Exh. N.

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F. The November 4, 2009 Warning

On November 4, 2009, Barker called Stevenson to his office and advised her that, as a written warning, he was giving her a memo about her inappropriate conduct in the October 30, 2009 staff meeting. Barker added that he did not appreciate Stevenson's tone of voice during the meeting, and that he did not want such conduct to occur again in the future. Tr. 78. Barker's memo stated:

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Re: Inappropriate Conduct

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This memo serves to inform you that your conduct during this past Friday's (Oct. 30) Ultrasound team meeting was totally inappropriate.

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The tone and manner in which you addressed me was condescending, disrespectful, and has no place in the work environment. This type of verbal communication serves no productive outcome and accomplishes no useful good.

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Joan, even with the points you made that had merit (and some of them did, in fact), the rude and curt manner in which you delivered them completely took away from whatever your intended purpose may have been.

This type of behavior displays a total lack of professionalism, and to display this in the presence of others reflects a complete lack of regard for them as well.

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Be advised that further occurrences of this nature will not be tolerated.

GC Exh. 5.

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Stevenson discussed the memo with Rutherford, and then took the letter to the union office. Stevenson also told the union officer that the issue of overtime came up at the October 30, 2009 meeting, and stated that staff technologists were still not getting preference when choosing overtime slots. After discussing these matters with the union officer, Stevenson decided not to respond to Barker's November 4, 2009 memo, but did prepare a memo (dated Nov. 11, 2009) to Union President Laretta Stevenson that outlined her concerns about the ultrasound department and Nina Madden's role in the department despite being an agency technologist. Both Joan Stevenson and Rutherford signed the November 11, 2009 memo. Tr. 80-83, 85-87, 153-154; GC Exh. 6.

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G. Stevenson's Step Two Union Grievance About Overtime, and The Respondent's Simultaneous Attempt to Address Stevenson's Conflict With Mire

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On November 12, 2009, the Union filed a step 2 grievance on Stevenson's behalf, alleging that the Respondent failed to adhere to the terms of the collective-bargaining agreement regarding contracting out work, overtime, and maintaining benefits. Tr. 92-93, 194; GC Exh. 7. On November 17, 2009, Stevenson learned from the Union that her step 2 grievance meeting would occur at 4 p.m. on November 19, 2009. The Union also advised Stevenson that Barker and Ms. Steven Mitchell (director of radiology) would be present as the

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Respondent's representatives, while Laretta Stevenson would serve as Joan Stevenson's representative. Tr. 93-94.

On November 18, 2009, Barker sent an email to Dr. Davis in response to concerns that she expressed about the incident (from early November) between Stevenson and Mire. Barker stated that "there have been some of the same issues between [Stevenson and Madden]," but indicated that he felt his options were constrained by "direction we're being given . . . that having staff should override having the right staff." Accordingly, Barker asked Dr. Davis to assist him by preparing a memo to describe the deficiencies in Stevenson's work that led her to ask Barker to pair Stevenson up with another ultrasound technologist (in July/August 2009) to improve Stevenson's skills. Barker also assured Davis that he intended to sit down with Stevenson and Mire to discuss their conflict. R. Exh. N at p. 1.

At approximately 2:35 p.m. on November 19, 2009, Barker (first, via Madden, and then directly) told Stevenson that he wished to meet with her in the conference room. Tr. 95-96, 259; R Exh. N at p. 2. When Stevenson finished working with her patient, she called the Union and confirmed that the grievance meeting was still scheduled for 4 p.m. According to Stevenson, the Union also advised her not to meet with Barker, since the grievance meeting was forthcoming that same afternoon. Tr. 96-97. Stevenson therefore continued to see patients, but did not tell Barker that she was not willing to meet with him in the conference room. Thus, Stevenson did not learn that the purpose of the proposed conference room meeting was to discuss her conflict with Mire (who, at Barker's request, had come to work early for the meeting) from earlier in the month.¹⁹ Tr. 262-263; R. Exh. N. at p. 2. Barker did not discipline Stevenson for failing to attend the meeting with Mire, but Stevenson's failure to appear at the meeting did prompt Barker to again ask Davis to provide the memo that he requested about the quality of Stevenson's work.²⁰ Tr. 262; R. Exh. N. at p. 2.

The union grievance meeting occurred at 4 p.m. on November 19, 2009, as scheduled, with one issue being how the Respondent distributed overtime among its employees, and particularly between staff and agency technologists. Mitchell attended the meeting, along with Laretta Stevenson and Joan Stevenson. Barker was not at the meeting initially, but arrived at 4:20 p.m. to provide (at Mitchell's request) a sample of the monthly overtime schedule.²¹ Tr. 365-369, 376.

H. Stevenson's Conflicts With Coworkers Continue

Madden and Stevenson had another disagreement in the morning on November 20, 2009. At that time, Madden was assigned to the outpatient ultrasound unit, and observed that five or six patients in that unit required studies. Madden called Stevenson, who was working in the inpatient ultrasound unit and was busy assisting Rutherford with (and learning how to do) a study for renal artery stenosis. When Madden asked for help with the patients in the outpatient unit, Stevenson stated that she knew about the list of patients, told Madden to handle them, and hung up the phone. Tr. 102-103, 155-256, 296-297; R. Exh. M. Stevenson joined Madden in

¹⁹ When about his efforts to speak to Stevenson about her conflict with Mire, Barker responded that Stevenson would not meet with him. Tr. 263. There is no evidence that Barker attempted to discuss the matter with Stevenson at any time besides November 19, 2009.

²⁰ In this same timeframe, Barker also told Mitchell that he did not believe Stevenson was going to work out as an employee. Tr. 266.

²¹ Before November 19, 2009, Mitchell advised Barker that a union grievance meeting was scheduled, but did not specify the date or time of the meeting. Tr. 366, 374-375.

the outpatient unit approximately 10–15 minutes after Madden’s phone call, after she and Rutherford completed their study. Tr. 156. Madden reported the telephone exchange to Barker, who asked her to “write it up.” Tr. 298. In her written incident report, Madden summarized the telephone conversation with Stevenson and asserted that she “felt the conversation was deeply inappropriate and it was rude for Joan to have hung up the phone. No coworker should be disrespected in a manner where they feel belittled by another coworker.” R. Exh. M. Barker never spoke to Stevenson to get her version of or explanation for the telephone conversation with Madden. Tr. 266.

Also on November 20, 2009, Barker held another monthly ultrasound department staff meeting. Rutherford, Stevenson, and Madden attended, as did Mitchell. Mitchell’s attendance was unusual, as (to Stevenson’s knowledge), he had never before attended such a meeting. The meeting was relatively brief, and occurred without incident. Barker provided the technologists with a copy of the December 2009 schedule. Barker intentionally left all night-shift slots open, which enabled Stevenson to sign up for all of the overtime slots that she wanted. Tr. 105–106, 412.

The day after Thanksgiving (Nov. 27, 2009), Stevenson reported to work and noted that staffing was thin because various employees were on vacation. During a busy period that morning, Stevenson was assisting Dr. Davis with a biopsy when she received a call from Ms. Beverly Brown (a/k/a Beverly Blake), who was working as a secretary in the outpatient department. Because of the focus required for the biopsy (a tense procedure, as Stevenson described it), Stevenson had trouble answering the phone when it first rang. When Stevenson picked up the phone, Brown asked Stevenson to come help with patients who were waiting for studies in the outpatient department. Stevenson told Brown that she couldn’t talk to her, and then hung up the phone. Brown then called Barker to ask him to bring someone to the outpatient department to assist the patients. Tr. 106–109, 177–178; GC Exh. 11.

Later on November 27, Stevenson approached Brown and apologized for how she spoke to Brown in the telephone conversation. After that exchange, Brown felt that the issue was resolved.²² Tr. 111–113, 178–179. However, in the afternoon, Barker asked Brown to write a note about her interaction with Stevenson. Barker returned to Brown’s office twice to see if Brown had written the requested note, and in fact waited while Brown wrote the note during his final visit shortly before the end of Brown’s shift.²³ Tr. 179–182; see also GC Exh. 11. Barker did not speak to or discipline Stevenson for her interaction with Brown.²⁴ Tr. 109, 267–268.

I. Respondent Resolves Stevenson’s Step 2 Union Grievance

In a memo dated November 30, 2009, Mitchell denied Stevenson’s Union grievance, finding that the grievance lacked merit. Tr. 370–371; R. Exh. D. Mitchell took the position that

²² Brown explained that she encounters similar situations (where she calls on a supervisor to ensure that technologists help with patients who are waiting) on a daily basis. Tr. 178.

²³ Brown delayed writing the note about her conversation with Stevenson because she did not believe the incident needed to be written up. Instead, Brown merely wanted Barker to advise Stevenson to communicate with her more effectively. Tr. 185–186.

²⁴ When asked to confirm the fact that he did not discuss the Brown incident with Stevenson, Barker interjected that Stevenson would not meet with him. Tr. 267–268. There is no evidence that Barker ever attempted to talk to Stevenson about the November 27 incident with Brown.

the collective-bargaining agreement exempts the radiology department from the procedures that apply before the Respondent may contract out bargaining unit work. Mitchell added that the radiology department nonetheless provided its technologists with the opportunity to volunteer for overtime by signing up for open slots on the monthly schedule. R. Exh. D. The Union filed a
 5 step 3 grievance on December 9, 2009, to contest Mitchell's decision. GC Exh. 12.

J. The December 18, 2009 Incident and Disciplinary Memo

On December 18, 2009, Stevenson's daughter came to the department at approximately
 10 12:30 p.m. because she had a CT scan scheduled for later in the afternoon. While Stevenson was working with a patient, she had her daughter sit in a nearby, vacant examination room. Barker noticed Stevenson's daughter in the room, and at 1:25 p.m., told Stevenson that he wanted to speak with her in his office. When Stevenson finished her patient's study (approximately 30–45 minutes after speaking with Barker), she went to meet with Barker, but
 15 Barker was not in his office. Stevenson therefore dropped her daughter off for her appointment, had lunch, and then resumed seeing patients (checking once more in this timeframe, and not finding Barker in his office). Stevenson finally met with Barker in his office at 3:30 p.m., where Barker admonished Stevenson for having her daughter in patient care. Stevenson apologized and promised that she would not make the same mistake in the future. Tr. 113–116; GC Exh. 8.

20 That same day, Barker prepared a written memo to Stevenson.²⁵ Barker described observing Stevenson's daughter in patient care at 1:10 p.m., and stated that at 1:25 p.m., he directed Stevenson to meet with him as soon as she finished working with the patient she was examining at the time. Barker acknowledged meeting with Stevenson at 3:30 p.m. that day, but asserted that:

your [Stevenson's] willful refusal to comply with my requests to meet with you is a serious problem. With this immediate matter, a radiology department is not a place that children should be, unless they are having a procedure or with a parent that is having
 30 one. Further, your failure to communicate made any efforts to work with the situation or come up with any workable alternative impossible.

GC Exh. 8.

K. Stevenson's Termination

On January 5, 2010, Barker recommended that the Respondent terminate Stevenson's employment due to unsatisfactory completion of her probationary period. GC Exh. 14. In support of that recommendation, Barker stated:

40 Ms. Stevenson was employed as an ultrasound technologist. During her time with [the Respondent], I received numerous complaints from Radiologists, her peers and coworkers regarding her rude, discourteous and unprofessional behaviors towards them. I have received written documentation from various staff regarding some of these
 45 episodes.

I have also been on the receiving end of some of these inappropriate behaviors. One

50 ²⁵ Although the memo was directed to Stevenson, she did not receive a copy until after she was terminated in January 2010. Tr. 116. Barker did not write the memo as a disciplinary memo. Tr. 269.

such occurrence took place during a team meeting in the presence of other staff.²⁶

Further, Joan has consistently and over time, displayed a totally insubordinate attitude and approach to any efforts I have made to try and sit down to discuss the above mentioned matters.

GC Ex. 14.

Barker's submitted his termination recommendation memo to the Respondent's human resources office, where it was received and reviewed by Regina Bryan, an employee and labor relations specialist. Tr. 190, 207. Bryan concurred with Barker's recommendation and prepared her own memo (to Anthony Jacks, director of human resources) to recommend Stevenson's termination for unsatisfactory completion of the probationary period.²⁷ Relying on Barker's memo, Bryan asserted that Stevenson did not acclimate to the working environment at the hospital, as demonstrated by her rude and inappropriate behavior and blatant disrespect towards her supervisor. GC Exh. 15; see also Tr. 211-112. Jacks gave his oral approval to terminate Stevenson on January 5, 2010.²⁸ GC Exhs. 15, 24.

Based on Jacks' oral approval, Bryan provided Barker with a termination notice to deliver to Stevenson. GC Exh. 9. At approximately 3:30 p.m. on January 5, 2010, Barker told Stevenson that he needed to see her in his office. Stevenson stopped by Barker's office shortly before 4 p.m., but Barker was not present. Stevenson therefore finished her shift and went home. Tr. 118-119.

Just after midnight on January 6, 2010, Stevenson returned to the hospital to work the night shift. To her surprise, two ultrasound technologists were already present (instead of just one, as she expected). Barker appeared, handed Stevenson the termination notice, and instructed her to pack her belongings and leave the premises. Tr. 119-120.

L. Stevenson's Grievance About Her Termination

Stevenson notified the Union about her termination, and the Union filed a grievance on her behalf on January 7, 2010, asserting that the Respondent's decision to discipline and discharge Stevenson violated the collective-bargaining agreement and was retaliatory. Tr. 120-23; GC Exh. 10. The grievance meeting occurred on January 12, 2010, and was attended by Ms. Amy Person (for the Union), Bryan, Barker, Stevenson, and one of the Respondent's attorneys. The parties debated the rationale for Stevenson's termination, and for the first time, Barker showed Stevenson the memos that he collected from coworkers about Stevenson. Tr. 123-127. The record does not state the result of Stevenson's grievance about her termination, but I infer from the record as a whole that Stevenson's grievance was not successful.

²⁶ Barker admitted that the team meeting he referenced in his memo was the October 30, 2009 ultrasound department staff meeting. Tr. 254-255.

²⁷ Time was of the essence with Stevenson's termination, since she was hired on July 6, 2009, and was nearly at the end of her probationary period. Tr. 221-222; GC Exh. 15.

²⁸ Jacks did not know Stevenson, and had never interacted with her. In making his decision to terminate Stevenson, Jacks considered Bryan's and Barker's memos (GC Exhs. 14 and 15), and spoke with Bryan about her recommendation. GC Exh. 24. Although he provided oral approval for Stevenson's termination on January 5, Jacks did not sign the termination memo (prepared by Bryan) until January 9, 2010. GC Exhs. 15, 24.

M. Disparate Treatment Evidence

As evidence of disparate treatment, the Acting General Counsel introduced two memos that Barker wrote about another employee, C.B., about conduct that occurred early during his (C.B.'s) employment. On September 18, 2008, Barker was with a DC Health Department inspector and discovered C.B. in a locked exam room listening to something on his earphones. C.B. explained that he had not had a break all day, and was entitled to a ten minute break. Barker admonished C.B. for being inside an exam room with the door locked for no legitimate reason, and for being reluctant to remove his earphones despite being aware of the inspector's visit. Barker also noted that while C.B. had many ideas and suggestions about the Radiology department that had merit, "the tone and manner in which you deliver them is inappropriate." Barker advised C.B. that as a probationary employee, he needed to be mindful of how he comes across and that he should show improvement quickly. GC Ex. 20.

On January 9, 2009, Barker gave C.B. a written reprimand for inappropriate and unprofessional behavior. Specifically, Barker cited the following incidents that occurred earlier in the month: a) C.B. left a portable x-ray unit and a patient requisition form sitting in front of the cafeteria while he had breakfast during his assigned shift; b) C.B. did not process nine operating room procedures correctly, creating the possibility that the Respondent would not be reimbursed for the procedures; and c) C.B. reported working a full day, but other information suggested that he was absent from the department for a considerable period of time and performed a low number of procedures. Barker warned C.B. that "any further occurrences like the above mentioned will result in progressive disciplinary actions to include termination of your employment."²⁹ GC Ex. 19. C.B. remained employed at the hospital at the time of the ALJ hearing in this matter. Tr. 269.

Complaint Allegations

As amended, the complaint alleges that the Respondent (through Barker) violated the National Labor Relations Act by:

1. telling employees, on October 30, 2009, that complaints about the terms and conditions of employment should not be discussed in the presence of other employees (in violation of Section 8(a)(1) of the Act);
2. telling employees, on November 4, 2009, that the tone in which they raised their complaints in the October 30, 2009 meeting was inappropriate (in violation of Section 8(a)(1) of the Act);
3. telling employees, on November 4, 2009, that he hoped they would not again raise concerns as they did in the October 30, 2009 meeting (in violation of Section 8(a)(1) of the Act);
4. issuing a disciplinary memorandum to Stevenson on November 4, 2009 (in violation

²⁹ The record does not show when C.B. concluded his probationary period. However, the language that Barker used in his January 9, 2009 memo (concerning progressive discipline, which is outlined in the collective-bargaining agreement for employees who have completed their probationary period) suggests that C.B. finished his probationary period before January 9, 2009. See GC Ex. 19.

of Section 8(a)(3) and (1) of the Act);

5. placing a disciplinary memorandum in Stevenson's file on December 18, 2009 (in violation of Section 8(a)(3) and (1) of the Act); and

6. discharging Stevenson on or about January 9, 2010 (in violation of Section 8(a)(3) and (1) of the Act).

See GC Exh. 1(c); fn.2, *supra*. In short, the Acting General Counsel alleges that the Respondent unlawfully interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and also unlawfully discriminated against employees in violation of the Act.

Legal Standards

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 n.3 (2000) (noting that the employer's subjective motivation for the statements is not relevant); *see also Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The legal standard for evaluating whether an adverse employment action violated the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007). If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Id.* at 1066; *see also Blue Diamond Growers*, 353 NLRB 50, 54-55 (2008); *Pro-Spec Painting*, 339 NLRB at 949. The General Counsel, however, may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal – an unlawful motive – at least where the surrounding facts tend to reinforce that inference.) (citation omitted). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Park N' Fly, Inc.*, 349 NLRB at 145 (citations omitted).

Discussion and Analysis

There is no dispute that Stevenson's stint in the radiology department was somewhat rocky, even in the early months of her tenure in 2009. However, the level of conflict rose significantly on and after October 30, 2009, the day of the ultrasound staff meeting at which Stevenson decided to air her concerns about the department. The alleged violations in the complaint understandably begin with that pivotal staff meeting.

1. The October 30, 2009 staff meeting

The complaint alleges (in pars. 9(a) and 11 – see GC Exh. 1-C) that the Respondent ran

afoul of Section 8(a)(1) of the Act at the October 30 meeting when Barker coerced employees by telling them that complaints about terms and conditions of employment should not be discussed in the presence of other employees.

5 It is well established that an employee's honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984); *see also Kingsbury, Inc.*, 355 NLRB No. 195 at 10 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained based rights – even if . . . it is incorrect – is protected and concerted activity.")

10 Based on that authority, I agree that Stevenson was engaging in protected concerted activity at the October 30 meeting. Stevenson advocated both her and Rutherford's interests, and more broadly, the interests of all staff technologists (including Mire) in the ultrasound
15 department to be given priority over agency technologists in various work related matters. Further, to the extent that Stevenson raised concerns about overtime (an issue covered by the collective-bargaining agreement); she was engaging in union activity. I also have credited Stevenson's and Rutherford's uncontradicted testimony that Barker indeed did assert that Stevenson should express her concerns to him privately. Tr. 69, 145–146. The record also
20 shows that when Stevenson declined Barker's request to voice her concerns privately, Barker permitted Stevenson to speak her mind in the staff meeting while the other ultrasound technologists were present. *Id.*

25 The fact that Barker suggested that Stevenson should raise her concerns with him in private (rather than in front of other employees at the staff meeting) does not, in and of itself, establish that the Respondent (through Barker) violated Section 8(a)(1). The General Counsel must also show that Barker's statement had a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Yoshi's Japanese Restaurant*, *supra* at 1339 fn.3. Moreover, the provisions of Section 8(c) of the Act must be considered, as that section states
30 that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit."

35 The record shows that at the October 30 meeting, Barker merely expressed his preference that Stevenson discuss her concerns with him privately, and invited Stevenson to agree to such an arrangement. Barker's statement was not accompanied by any actual or implied threat to Stevenson (or anyone else) if she opted to proceed with voicing her concerns at the staff meeting. Nor was there any suggestion that employees were prohibited from
40 discussing the terms and conditions of employment with each other as a general matter.³⁰

30 In this connection, I do not see Barker's suggestion as a work rule that explicitly restricts Sec. 7 activity or that was issued or applied for the purpose of restricting such activity. Nor could employees reasonably construe Barker's suggestion that he and Stevenson talk privately
45 as a rule to prohibit Sec. 7 activity. *See Northeastern Land Services*, 352 NLRB 744, 745 (2008) (articulating the legal standard for such work rules). Indeed, such a finding would be contrary to the facts of this case, including the undisputed fact that before Barker suggested (based on his impression of Stevenson's tone) that he and Stevenson speak privately, he invited employee comments about the ultrasound department. While the Acting General
50 Counsel did point out that Barker (during trial) confirmed that he believes "when a supervisor tells an employee they should not talk about an issue in a roomful of people, that employee

Continued

In the absence of any other evidence that Barker's statement had a tendency to be coercive, I recommend dismissing the allegations in paragraph 9(a) of the complaint.

2. Barker's November 4, 2009 meeting With Stevenson

Regarding the events of November 4, 2009, the complaint alleges that the Respondent coerced employees in violation of Section 8(a)(1) when Barker told them "he found the tone in which they raised their complaints in the [October 30] meeting . . . to be inappropriate," and when he told them that "he hoped they would not again raise concerns as they did in the [October 30] meeting." GC Exh. 1-C (pars. 9(b) and 11); Tr. 170-171 (adding par. 9(c) to the complaint).

The complaint also alleges that Respondent violated Section 8(a)(3) and (1) when it issued a disciplinary memorandum to its employee, Joan Stevenson. GC Exh. 1-C (pars. 10(a) and 12).

I have credited Stevenson's uncontradicted testimony about Barker's comments in the November 4, 2009 meeting. See Tr. 78, 252. Barker's November 4, 2009 memo to Stevenson (in which he sets forth his objections to Stevenson's conduct at the October 30 staff meeting) also carries considerable weight, and fully corroborates Stevenson's account of the November 4 meeting.

As noted above, I agree that Stevenson engaged in protected concerted activity and union activity at the October 30 meeting, as she reasonably asserted rights on behalf of both herself and other staff ultrasound technologists that related to the terms and conditions of employment, and implicated the terms of the collective-bargaining agreement regarding overtime. However, the Respondent argues that it issued the November 4 disciplinary memo to Stevenson because of her tone (and not because of her comments) in the October 30 meeting. In so arguing, the Respondent invokes the theory that its November 4 disciplinary memo was lawful because Stevenson's conduct at the staff meeting was so egregious as to take it outside the protection of the Act. *Ogihara America Corp.*, 347 NLRB 110, 112 (2006) (internal quotations omitted).

The *Wright Line* standard does not apply in this circumstance, where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a single motive case, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002). Specifically, "[w]hen an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 21 (2002). In making this determination, the Board examines the following factors:

should stop talking" (Tr. 250), there is no evidence that Barker expressed that view to Stevenson on or before October 30, 2009.

In addition, I note that the General Counsel did not identify any Board decision that deemed statements similar to Barker's to be coercive. See GC Posttrial Br. at 28 (citing cases only for the proposition that the Board considers all of the surrounding circumstances and uses an objective standard when determining whether a statement violates Sec. 8(a)(1)). The lack of such authority is consistent with my finding that, viewed objectively, Barker's comments on October 30, 2009 were not coercive and thus did not violate the Act.

(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).” *Stanford Hotel*, 344 NLRB 558, 558 (2005).

In this case, the relevant factors largely support Stevenson. First, Stevenson's protected activity occurred in a scheduled ultrasound staff meeting, and began after Barker expressly asked if any employees at the meeting had any concerns they wished to raise. Second, the subject matter of the discussion (whether agency technologists were getting preferential treatment over staff technologists regarding overtime, department leadership and other ultrasound department matters) was directly related to terms and conditions of employment in the ultrasound department. And third, the evidentiary record does not support a finding that Stevenson engaged in any sort of outburst that removed her conduct from the protection of the Act.³¹ At most, Stevenson spoke in a firm manner and with a slightly elevated voice, consistent with the strength of her belief that staff technologists were being treated unfairly. While Barker certainly would have preferred that Stevenson voice her concerns outside of the presence of other employees and in a less confrontational manner (from his perspective), the fact remains that Stevenson's conduct was not so egregious as to remove it from the protection of the Act.³²

Since Stevenson's remarks and conduct at the October 30 meeting did not cross over the line separating protected and unprotected activity, I find that the Respondent violated Section 8(a)(3) and (1) when it issued the November 4 disciplinary memo to Stevenson for her "inappropriate conduct" at the staff meeting.

I also find that given the totality of the circumstances (which include handing Stevenson the unlawful discipline memo), Barker's comments to Stevenson on November 4 (as stated in pars. 9(b) and (c) of the complaint) violated Section 8(a)(1) of the Act because they had a reasonable tendency to interfere with, restrain or coerce protected activities. In effect, the Respondent unlawfully warned Stevenson about her October 30 protected activity, and further warned that she should not engage in similar (protected) activity in the future. Such comments could reasonably be expected to restrain or coerce employees from asserting their Section 7 rights.

3. The Respondent's Decision to Discipline Stevenson on December 18, 2009

There is no dispute that, as alleged in the complaint (GC Exh. 1 – par. 10(b)), the Respondent placed a memo in Stevenson's file on December 18, 2009, citing Stevenson for having her child in the patient care area and for delaying complying with Barker's request for a meeting about that issue. See GC Exh. 8. Consequently, the December 18, 2009 memo was effectively a disciplinary memo, even if Barker did not draft it as such.

³¹ The fourth factor in the analysis (whether the employee's outburst was provoked by an unfair labor practice) is at most neutral. Although Stevenson's conduct was not provoked by an unfair labor practice, it is also a stretch to characterize her conduct as an outburst.

³² The Board's decision in *Lana Blackwell Trucking, LLC*, 342 NLRB 1059 (2004), is instructive on this point. In that case, the Board determined that an employee who "acted purposefully and emphatically towards management, and . . . occasionally raised his voice" while engaging in protected activity did not engage in conduct sufficiently serious to warrant denying the employee the protection of Section 7 of the Act. *Id.* at 1062 (making this finding even though the manager subjectively believed that the employee was rude, disrespectful and embarrassed her in front of other employees).

The Acting General Counsel alleges that the Respondent discriminated against Stevenson in violation of Sections 8(a)(3) and (1) of the Act when it placed the December 18, 2009 memo in Stevenson's file.³³ GC Ex. 1 – par. 12. The Respondent counters that the December 18 memo was issued to address a legitimate problem that was unrelated to any protected activity.

The *Wright Line* framework applies to this allegation in the complaint. I find that the Acting General Counsel presented enough evidence to make its initial showing that Stevenson's prior protected activity was a substantial or motivating factor in the Respondent's decision to place the December 18 disciplinary memo in Stevenson's file. As noted previously, Stevenson's comments at the October 30 staff meeting qualify as protected activity, as do Stevenson's efforts in November and December 2009 to pursue her union grievance regarding contracting out work, overtime, and maintenance of benefits. See GC Exhs. 7, 12. The Respondent was aware of the protected activity, since Barker was at the October 30 meeting, and both Barker and Mitchell responded to Stevenson's November 2009 union grievance. The Acting General Counsel has also demonstrated the Respondent's animus towards Stevenson's protected activity, as demonstrated by Barker's swift decision to discipline Stevenson (on November 4) specifically for her conduct at the October 30 meeting, and Barker's increasingly negative assessment of Stevenson's ability to get along in the department. Tr. 266. See *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 (2006) (explaining that the timing of an adverse employment action in relation to protected concerted activity can provide strong evidence of an employer's animus); *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) (explaining that an employer's comments that an employee does not have the right spirit, has a bad attitude, and is argumentative and uncooperative can be veiled references to the employee's protected activities, and thus circumstantial evidence of animus) (collecting cases).

Turning, then, to the Respondent's affirmative defense, the Respondent contends that it issued the December 18 memo without regard to any of Stevenson's prior protected activity. The Respondent's position is somewhat supported by the fact that the Respondent's December 18 memo stands on its own, without reference to any other events besides those that occurred on that same day. More significantly, the disparate treatment evidence that the Acting General Counsel offered at trial supports the Respondent's position in this instance. In September 2008, Barker issued a disciplinary memo to employee C.B., who was a probationary employee at the time. Barker took issue with C.B. being present in a locked exam room when he was not with a patient, and with C.B.'s reaction to being discovered (which included debating his need for a break, providing dubious explanations for what he was doing in the exam room, and failing to remove his earphones in the presence of an inspector who was with Barker). GC Exh. 20. Stevenson's conduct on December 18, 2009 was quite similar to C.B.'s. There is no dispute that Stevenson improperly had her daughter with her in the patient care area (in an empty examination room). Barker also took issue with Stevenson's delay in meeting with him, as although he told Stevenson he wanted to see her as soon as she finished the patient she had at the time, the meeting did not occur until two hours later.³⁴ GC Exh. 8. While C.B.'s and

³³ Although the December 18 memo was addressed to Stevenson (from Barker), the record shows that Stevenson did not receive the memo until after she was terminated in January 2010. Tr. 116.

³⁴ I found Stevenson's explanation of the reasons for the delay (including not finding Barker in his office when she went to see him) to be credible. Barker, however, was not privy to Stevenson's explanation when he wrote the disciplinary memo.

Stevenson's respective incidents are not identical,³⁵ I do find that they are sufficiently similar to support a finding that the Respondent would have placed the December 18 memo in Stevenson's file irrespective of her prior protected activity. Accordingly, I recommend dismissing this allegation in the complaint.

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4. Stevenson's Termination On Or About January 9, 2010

The Acting General Counsel's final allegation is that the Respondent violated Sections 8(a)(3) and (1) of the Act when it discharged Stevenson on or about January 9, 2010. GC Exh. 1-C, pars. 10(d) and 12; Tr. 13. The *Wright Line* standard applies to this allegation, since the Respondent maintains that it discharged Stevenson not for protected activity, but instead because she was rude, discourteous, unprofessional and insubordinate and thus did not complete her 6 month probationary period in a satisfactory manner.

The precise date of Stevenson's termination is somewhat relevant to the Respondent's defense. Stevenson's probationary period (like any other employee's) lasted for 6 months from her start date. Once the probationary period ends, the progressive discipline rules in the collective-bargaining agreement apply to the employee's conduct. In Stevenson's case, the probationary period ended at 11:59 p.m. on January 5, 2010, 6 months after her July 6, 2009 start date. The Respondent argues that Stevenson was terminated on January 5, 2010, the day that the Director of Human Resources (Anthony Jacks) orally approved Stevenson's termination, and the date of Stevenson's termination letter. GC Exh. 9; see also Tr. 119-120 (noting that the Respondent delivered the termination letter to Stevenson just after midnight on January 6, 2010). The Acting General Counsel argues that Stevenson was terminated on January 9, 2010, the day that Jacks signed and dated the final recommendation (prepared by Regina Bryan) for Stevenson's termination. GC Exh. 15. After considering the evidentiary record, I find that the Respondent indeed terminated Stevenson on January 5, 2010. The Respondent completed its approval process for the termination on January 5 (save for the administrative details of having Jacks physically sign the paperwork, and notifying Stevenson of the decision), and consistent with that development, the Respondent did not permit Stevenson to work when she came to the hospital to begin her shift at midnight on January 6.

The fact that Stevenson (barely) remained a probationary employee does not, however, doom the Acting General Counsel's claim that Stevenson's discharge was unlawful. To the contrary, the Acting General Counsel may still show that Stevenson's prior protected activity was a substantial or motivating factor in the Respondent's decision to discharge her. Regarding that issue, Stevenson's comments at the October 30 staff meeting still stand as protected activity, as do Stevenson's efforts to pursue her November and December 2009 Union grievances. As noted above, the Respondent (through Barker, and also through Mitchell) was aware of the protected activity. As for animus, the Acting General Counsel's case is supported not only by circumstantial evidence of veiled references to Stevenson's protected activities (summarized in sec. 3, above), but also by an explicit reference to Stevenson's October 30, 2009 protected activity contained in Barker's termination recommendation memo. In outlining his rationale for recommending Stevenson's termination, Barker wrote: "During [Stevenson's]

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³⁵ In summary form, C.B. was a probationary employee who the Respondent disciplined for: misusing an empty exam room for himself; debating the issue with Barker (and offering dubious explanations in that debate); and displaying poor professionalism in the presence of an inspector. Stevenson was also a probationary employee who the Respondent wrote up for: misusing an empty exam room for a non-employee (her daughter); and for not promptly meeting with her supervisor to address the matter.

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time with HUH, I received numerous complaints . . . regarding her rude, discourteous and unprofessional behaviors[.] . . . I have been on the receiving end of some of these inappropriate behaviors. One such occurrence took place during a team meeting in the presence of other staff.” GC Exh. 14; Tr. 254–255 (Barker’s admission that the team meeting that he was referring to was the October 30, 2009 staff meeting). Based on this collection of evidence, the Acting General Counsel met its initial burden of showing that the Respondent’s decision to discharge Stevenson was unlawful.

Following *Wright Line*, the burden shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Stevenson even in the absence of her Union or protected activity. When Barker recommended Stevenson’s termination, he limited his rationale to Stevenson’s track record with interpersonal relations,³⁶ citing her rude, discourteous and unprofessional behaviors towards Radiologists, peers and coworkers, and a totally insubordinate attitude towards Barker’s efforts to address Stevenson’s inappropriate behaviors. The Respondent, through Bryan and then Jacks, relied on and accepted Barker’s recommendation that Stevenson be terminated. GC Exh. 15; Tr. 211–212.

The record does show that Barker was aware of at least some of Stevenson’s conflicts with other employees in the Radiology department. Through communications with Dr. Davis, Barker believed that he needed to address the early November 2009 conflict between Stevenson and Mire. Barker also had written descriptions of two November 2009 telephone conversations (one with Brown and one with Madden) in which Stevenson spoke to a co-worker in (at a minimum) a terse and abrupt manner. While those incidents could reasonably have led the Respondent to believe some limited corrective action was necessary, the Respondent’s decision to use those incidents to justify Stevenson’s termination rings of pretext in light of the evidence that Barker merely issued a disciplinary memo (on two different occasions) to employee C.B. for unprofessional or inappropriate conduct.³⁷ GC Exh. 19, 20.

The Respondent’s assertion that Stevenson was insubordinate to Barker’s efforts to address her interpersonal interactions in the hospital also rings of pretext. The record shows that Barker did not make an effort to speak to Stevenson about her conflicts with either Brown or Madden. Tr. 266–228. When asked to confirm this at trial (as to the conflict with Brown), Barker responded with a knee-jerk answer that Stevenson would not meet with him. Tr. 267–268. Barker offered the same rote answer (“She would not meet with me.”) when asked if he ever spoke with Stevenson about her conflict with Mire (Tr. 263), and about his overall efforts to meet with Stevenson to address his concerns about her interpersonal communication skills. (Tr. 273) I did not find Barker’s testimony credible on this point (Stevenson’s willingness to meet with him), given his automatic and rote responses that lack consistency with the record

³⁶ Notably, Barker did not allege that Stevenson was deficient in her ability to carry out the technical responsibilities of an ultrasound technologist. Nor did Barker assert that Stevenson’s conduct on December 18, 2009 (*i.e.*, permitting her daughter to be in the patient care area) warranted (in whole or in part) her discharge.

³⁷ In September 2008, Barker issued a disciplinary memo to C.B. for (among other things) the tone and manner in which he communicated his opinions about the radiology department. C.B. was still a probationary employee at the time. GC Exh. 20. Barker issued C.B. another disciplinary memo in January 2009, again citing unprofessional and inappropriate conduct (and noting, among other things, C.B.’s poor response to a radiologist who approached him about an x-ray unit and a patient requisition that C.B. left in front of the cafeteria). GC Exh. 20. C.B. was not terminated for either incident, and was still employed by the Respondent at the time of trial. Tr. 269.

as a whole.³⁸

Given Barker's explicit reference to Stevenson's protected activity (at the October 30 staff meeting) in his termination recommendation memo, and the evidence showing that his other proffered reasons for recommending Stevenson's termination were pretextual, I find that the Acting General Counsel has met its burden of proving that the Respondent terminated Stevenson for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. By making two statements on November 4, 2009, that have a reasonable tendency to interfere with, restrain, or coerce union or protected activities, the Respondent violated Section 8(a)(1) of the Act.

2. By issuing a discriminatory disciplinary memo to employee Joan Stevenson on November 4, 2009, the Respondent violated Section 8(a)(3) and (1) of the Act.

3. By discharging employee Joan Stevenson on January 5, 2010, for engaging in union and other protected concerted activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices stated in Conclusions of Law 1, 2, and 3 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. I recommend dismissing the allegations stated in paragraphs 9(a) and 10(b) of the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Joan Stevenson, the Respondent must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the

³⁸ In this connection, it bears noting that Barker had multiple opportunities to meet with Stevenson. On November 19, Stevenson admitted that she did not attend a requested meeting with Barker (and Mire) because her union grievance meeting was already scheduled for later on the same day. Barker attended the latter part of the union grievance meeting, but did not take the opportunity after that meeting to meet with Stevenson about her relationships with her coworkers. Similarly, there is no evidence that Barker asked Stevenson to meet with him after the November 20 staff meeting, nor is there evidence that Barker raised any of Stevenson's office conflicts when he met with Stevenson on December 18, or at any other opportunity that arose by virtue of Barker's status as Stevenson's supervisor.

following recommended³⁹

ORDER

5 The Respondent, Howard University Hospital, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities or supporting the National Union of Hospital and Health Care Employees, Local 2094, American Federation of State, County and Municipal Employees, or any other union.

15 (b) Warning employees for engaging in protected concerted activities or union activities at employee staff meetings.

 (c) Telling employees not to engage any future protected concerted activities or union activities at employee staff meetings.

20 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

25 (a) Within 14 days from the date of the Board's Order, offer Joan Stevenson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

30 (b) Make Joan Stevenson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision, with interest.

35 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline and discharge, and within 3 days thereafter notify Joan Stevenson in writing that this has been done and that the discipline and discharge will not be used against her in any way.

40 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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50 ³⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."⁴⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means.⁴¹ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 4, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. , December 1, 2010.

Geoffrey Carter
Administrative Law Judge

⁴⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴¹ The notice posting language provided herein (specifically regarding distributing notices electronically) is consistent with the Board's recent decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities, or for supporting the National Union of Hospital and Health Care Employees, Local 2094, American Federation of State, County and Municipal Employees, or any other union.

WE WILL NOT warn employees for engaging in protected concerted activities or union activities at employee staff meetings.

WE WILL NOT tell employees not to engage any future protected concerted activities or union activities at employee staff meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Joan Stevenson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Joan Stevenson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline and discharge of Joan Stevenson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

HOWARD UNIVERSITY HOSPITAL

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.